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Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

JUL 22 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
 Implementation of Sections of)
 the Cable Television Consumer)
 Protection and Competition Act)
 of 1992 Rate Regulation)

MM Docket 92-266

COMMENTS OF USA NETWORKS ON RECONSIDERATION

The petitions for reconsideration filed by cable programmers and cable operators alike demonstrate that the rate regulation system adopted by the Commission will seriously impair realization of the statutory mandate to preserve and promote program choice, quality and originality. USA Networks submits these comments to emphasize and reinforce the conclusion that, at least, two fundamental regulatory changes must be made if there is to be any prospect of preserving and promoting high quality, diverse programming on cable television:

(a) The "tier neutral" approach to regulation of cable programming services must be abandoned. The evidence is plain that the application of benchmarks to upper tiers will impede the launch of new program services; indeed, the benchmark mechanism has already produced a virtual freeze in the cable

Commission on a case-by-case basis with reference to the
specific facts of each situation as the statute itself

In its petition for reconsideration, the Discovery Channel states that there has been a "freeze in the cable programming market": Although cable operators continue to be interested in the expansion of service and the provision of new, innovative program offerings, the addition of new services to systems throughout the United States has virtually stopped since the issuance of the First Report and Order.^{1/} BET, The Disney Channel, E! and Encore (among others), state that they are also experiencing the same problem in signing up cable systems. USA Networks' experience in its efforts to expand distribution of the Sci-Fi Channel is not dissimilar.

In part, this "freeze" is due to the fact that the per channel benchmarks the Commission has developed are fatally flawed.^{2/} It is clear that the tier neutral approach to rate regulation has contributed to the problem. The fact is that the addition of a new service to a cable tier requires an investment of money and other resources that simply cannot be measured by a static and historic measurement of benchmark prices.^{3/} Tier neutrality deprives cable operators of the economic incentive -- and in some cases, the economic

^{1/} Discovery Communications, Inc., Petition for Reconsideration ("Discovery Petition") at 2.

^{2/} See Petition for Reconsideration of Time-Warner Entertainment Company at 2-3.

^{3/} Id. at 12.

ability -- to add new, high quality program services to their systems.^{4/}

Tier neutrality may also make it necessary for cable operators to offer some services previously carried on tiers at a separate per channel rate. Each of the cable programming networks that has submitted petitions for reconsideration has made it absolutely clear that this "solution" to the problem created by the tier neutral regulatory system will have

will either receive less attractive programming or pay more for it than they pay now, or both.

The Cable Act of 1992 was not intended to produce these results. On the contrary, under the Act, the Commission's goal is to establish a regulatory system which assures cable subscribers access to the broadest possible choice of high quality programming at rates which are reasonable. Where is no

variables cannot be forced into a simple standard; upper tier rates may not be unreasonable even though they exceed some calculated or derived benchmark norm. See Comments of USA Network, 9. The use of a more flexible standard for the regulation of cable programming services is better fitted to the terms of the statute than is the tier neutral concept and more effectively reflects its basic goals.

The Pass-Through Mechanism Should Be Refined
to Reflect Full Recognition of the Way
Program Cost Increases Occur.

The Commission's adoption of a pass-through mechanism applicable to program costs is fundamentally sound and, in concept, has not been challenged by any of the parties seeking reconsideration. However, in adopting the procedures for its implementation, the Commission has imposed two limitations that are unfair to cable operators and programmers alike. The rule (76.922(b)) should be modified to permit cable operators to reflect in initial regulated rates any increases in programming costs for cable networks that have been incurred between the date of the rate freeze (October 1, 1992) and the effective date of the regulations. The rule also should provide that the starting date for measuring subsequent changes in program costs under the pass-through mechanism is the effective date of the rules. Otherwise, cable operators will forever be denied the opportunity to recover costs that they have legitimately

increased and that have contributed to the overall economic growth.

serves no valid public interest goal. The Commission has offered an explanation for its decision to defer implementation of the pass-through mechanisms as it applies to retransmission consent fee increases until October 6, 1994, but those considerations simply do not apply to increases in program costs incurred by cable operators in the carriage of basic cable networks. The contractual arrangements between cable operators and cable programmers do not involve a "new regulatory and statutory mechanism" with which the industry and the Commission "have no experience". First Report and Order at ¶ 247. These arrangements have existed for years.

The contractual arrangements between cable operators and cable networks with respect to per-subscriber fee are negotiated on an arms length basis. These contracts are typically entered into for multi-year periods and provide for increases in per-subscriber fees on a scheduled basis. It is fundamentally unfair for the Commission not to recognize these cost increases. Cable operators should have the right to recoup increased costs incurred under cable network affiliation agreements after September 30, 1992.


The Commission's limitation of the use of the pass through mechanism until 180 days after the effective date of the Commission's regulations will mean that many cable systems will never be able to recover any part of program cost increases that have occurred between October 1, 1992 until April 1,

1994. These costs are and will be legitimately incurred and have contributed to the quality and diversity of programming that cable subscribers enjoy. They should be recoverable as a part of initial rates and through the pass-through mechanism.

Respectfully submitted,

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